Supreme Court, U.S.
FILED
NOV 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

(1)

86-827

NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

KEWAL JAIN,

Petitioner,

vs.

ITT GRINNELL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

David T. Lopez
David T. Lopez & Assoc.
7660 Woodway - Suite 250
Houston, Texas 77063
(713) 266-5536

Attorney for Petitioner

19 pp

QUESTIONS PRESENTED

1. May the Seventh Amendment right to a jury in a racial discrimination case be determined on the basis of words used in the pleadings or speculation as to what the evidence will show with respect to damages?

2. When the trial judge strikes a case from a jury docket by written order, must a party demanding jury trial refuse to proceed to trial or make some other protest in order not to waive his constitutional right to a jury?

PARTIES TO THE PROCEEDINGS

Kewal Jain - Petitioner

ITT Grinnell Corporation - Respondent

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
PARTIES TO THE PROCEEDINGS.....	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES.....	iv
OPINION BELOW.....	1
JURISDICTION OF THIS COURT.....	1
CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE INVOLVED.....	2
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT....	12
General Statement.....	12
I. The Constitutional Right to a Jury Trial in a Racial Discrimination Case Must Not Rest Ultimately On the Wording of the Pleadings or On an Anticipation of Facts to Be Established.....	14
A. Relationship to Pending Cases.....	14
B. The Importance of a Jury Trial.....	15
C. Denial of Jury Trial Below.....	17

D. The Standards in This Court..... 19

E. Opinions in Other Courts of Appeal..... 25

II. Failure to Continue Protest After a Written Order Denying Jury Trial Is Not a Waiver..... 29

CONCLUSION AND PRAYER..... 33

CERTIFICATE OF SERVICE..... 34

APPENDIX..... A-1

TABLE OF AUTHORITIES

Page

Constitutional Provisions and Statutes:

United States Constitution...19

Seventh Amendment..... 1,2,3,16, 17,22,23,33, 34

28 U.S.C. § 1254(1)..... 2

28 U.S.C. § 1343(4)..... 1

28 U.S.C. § 2201..... 4

42 U.S.C. § 1981..... 8,12,13,14, 15,18,19,24, 25,27,28

42 U.S.C. §§ 2000e *et seq*.... 1,8,20,21

Cases:

Aetna Insurance Company vs. Kennedy, 301 U.S. 389, 393, 81 L.Ed. 1177 (1937).....30

Al-Khazraji vs. Saint Francis College, 784 F.2d 505 (3rd Cir. 1986) *cert. granted*, No. 85-2169 (Oct. 7, 1986).....14

Albemarle Paper Company vs. Moody, 422 U.S. 405, 415-416, 45 L.Ed.2d 280 (1975).... 21

Beacon Theatres vs. Westover, 359 U.S. 500, 510, 3 L.Ed. 2d 988 (1959)..... 19,20

Byrd vs. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 539, 2 L.Ed.2d 953 (1958) 16

Curtis vs. Loether, 415 U.S. 189, 190 n. 1, 39 L.Ed.2d 260 (1974)..... 25

Dairy Queen, Inc. vs. Wood, 369 U.S. 469, 8 L.Ed.2d 44 (1962). 20,22

Gannett Company vs. DePasquale, 443 U.S. 368, 385, 61 L.Ed. 2d 608 (1979)..... 16

Hildebrand vs. Board of Trustees of Michigan State University, 607 F.2d 705, 709 (6th Cir. 1979)..... 26,27

Jones vs. Birdsong, 679 F.2d 24 (5th Cir. 1982), reh. denied, 683 F.2d 417, cert. denied, 459 U.S. 1202, 75 L.Ed.2d 433 (1983)..... 31

Laskaris vs. Thornburgh, 733 F.2d 260, 264, (3rd Cir. 1984), cert. denied, ___U.S.___, 83 L.Ed.2d 196 (1984)..... 28

Lynch vs. Pan American World Airways, 475 F.2d 764, 765 (5th Cir. 1973) (per Curiam)..... 26,27

Moore vs. Sun Oil Company of Pennsylvania, 636 F.2d 154 (6th Cir. 1980)..... 27

Novak Investment Company vs. Setser, 454 U.S. 1064, 70 L. Ed.2d 601 (1981)..... 13,26, 27

Parklane Hosiery Company vs. Shore, 439 U.S. 322, 338, 58 L.Ed.2d 552 (1979)..... 15,16, 17

Ross vs. Bernhard, 396 U.S. 531, 24 L.Ed.2d 729 (1970)..... 20

Schneckloth vs. Bustamonte, 412 U.S. 218, 235-237, 36 L.Ed.2d 854 (1973)..... 31

Scott vs. Neely, 140 U.S. 106, 109, 110, 35 L.Ed. 358 (1891). 20

Shaare Tefila Congregation vs. Cobb, 785 F.2d 523 (4th Cir. 1986), cert. granted, No. 85-2156 (Oct. 7, 1986)..... 14

Simler vs. Conner, 372 U.S. 221, 222, 9 L.Ed.2d 691 (1963) (per Curiam)..... 17

Southland Reship vs. Flegel, 534 F.2d 639 (5th Cir. 1976)..... 31

Rules:

Federal Rules of Civil Procedure (general)..... 22,32, 33

Rule 38..... 2,3,5, 30

Rule 39..... 2,3,5,8

Rule 46..... 32

Rule 57..... 2,4

Rule 79(c)..... 2,5

U.S. Supreme Court Rule 17..... 12,13

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is not reported. It is reproduced in the Appendix, beginning at page A-5.

JURISDICTION OF THIS COURT

This is an employment discrimination case in which federal jurisdiction properly was invoked in accordance with the provisions of 28 U.S.C. § 1343(4) pertaining to actions for damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, and 42 U.S.C. § 2000e-5 (f)(3) relating to actions brought under Title VII of the 1964 Civil Rights Act. The trial court properly exercised pendent jurisdiction over a State defamation claim. The opinion of the United States Court of Appeals for the Fifth Circuit was rendered August 4, 1986. A timely

petition for rehearing filed by the petitioner was denied by order of August 25, 1986, reproduced in the Appendix at p. A-3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULES OF PROCEDURE INVOLVED

This petition involves the proper interpretation of the Seventh Amendment to the United States Constitution and Rules 38, 39, 57 and 79(c), Federal Rules of Civil Procedure.

The Seventh Amendment to the United States Constitution states as follows:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 38(a) and (b), Fed. R. Civ. P., provides as follows:

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party."

Rule 39(a), Fed. R. Civ. P., states as follows:

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket

as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

Rule 57, Fed. R. Civ. P., states as follows:

"The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. § 2201, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in

Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Rule 79(c), Fed. R. Civ. P., states as follow:

"(c) Indices; Calendars. Suitable indices of the civil docket and of every civil judgment and order referred to in subdivision (b) of this rule shall be kept by the clerk under the direction of the court. There shall be prepared under the direction of the court calendars of all actions ready for trial, which shall distinguish 'jury actions' from 'court actions.'"

STATEMENT OF THE CASE

The Petitioner, Kewal C. Jain,

hereinafter referred to as the employee, was born in India, where he obtained a bachelor's degree in Mechanical Engineering. Trial Transcript (Tr.) 293-294. After entering the United States in 1974, he obtained a master's degree in Industrial Engineering from Texas Technological University. Tr. 294. He was hired by the Respondent, ITT Grinnell Corporation, hereinafter the company, in 1978, as Shipping Manager. Tr. 297. He received promotions to higher supervisory levels in early 1980. Tr. 300.

Essentially, the employee contended in his lawsuit that when the plant manager died and was replaced, Tr. 7-8, the employee began having problems in early 1981, Tr. 18, which eventually led to his discharge. Tr. 43-44.

In support of his allegations of racial and religious discrimination, the employee offered testimony of co-workers who testified they heard supervisory officials ridicule the employee's religion and refer to him as a "camel jockey," Tr. 121-126, 143-145, 163-167, 178-179, 227-229, 237-240.

The employee himself testified that he heard company officials refer to him as "that Indian" and state that he was going to be discharged. Tr. 312-315.

This background relating to the allegations of the employee is provided simply to show that there appears to be evidence from many witnesses which a jury could have credited in determining that racial discrimination was shown as a matter of fact.

Otherwise, this petition does not deal with the underlying facts or

merits of the case, but with the procedures before the trial court and on appeal.

On February 11, 1983, the employee filed his original complaint. It included a jury demand, in accordance with Rule 39(b), Fed. R. Civ. P.

Entry number 1 on the docket states: "Complaint, including jury demand, filed." (Emphasis added.) The original complaint invoked both Title VII of the 1964 Civil Rights Act and 42 U.S.C. § 1981. It sought declaratory relief, and in addition to back pay, it sought compensatory damages for "anguish and humiliation."

On August 10, 1983, the employee filed a motion for leave to file an amended complaint, and when the motion was granted on August 19, 1983, docket entry number 8 stated as follows:

"Plaintiff's First Amended Complaint, including jury demand, filed." (Emphasis added.) The first amended complaint added a claim of defamation under the State law.

On December 28, 1983, the court issued a notice of trial setting, docket call, and jury selection for 9:30 a.m. on January 16, 1984. This notice is reproduced in the Appendix at p. A-35.

The employee moved for leave to file a second amended complaint to specify that the discrimination against the employee was as a result of color. The motion is reproduced in the Appendix at p. A-32.

On the same day, apparently as a result of a telephone communication with one or both counsel, which is not of record, the trial court entered

a written order denying leave for the second amendment and stating that the case would remain on the non-jury calendar. This order is reproduced in the Appendix at p. A-30.

There was no motion to strike the jury demand or otherwise deny a jury. There was no notice by the trial court that the motion to amend would somehow be related to the jury demand which had been on file for nearly one year. The order of the court assumed erroneously that the case had been on a non-jury docket and was limited to denial of an amendment without addressing the entitlement to a jury.

On appeal, the Fifth Circuit assumed erroneously that the case had been placed on a non-jury calendar, see the opinion on appeal at p. A-14. A petition for rehearing which called

to the attention of the court the notice of trial including jury selection was denied without comment. Appendix at p. A-3, 4.

With respect to the question of whether there was an issue of race in the case, the record shows that the employee filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) based on race, religion, and national origin. Record on Appeal Vol. I pp. 40-41. After the motion to file a second amended complaint was denied, the employee changed counsel and the new counsel again attempted to amend the complaint. In opposing amendment, the attorney for the company stated as follows: "The amended complaint seeks to add a claim that 'national origin' was a basis of the discrimination, whereas the prior

complaints were based on 'race, color and religion.'" Record on Appeal Vol. I p. 27. The findings of fact entered by the trial judge included a finding that the employee "is a member of a protected class for purposes of 42 U.S.C. 1981," and also included a finding that the employee had not been defamed as a matter of fact. Appendix at p. A-23.

REASONS FOR GRANTING THE WRIT

General Statement

It is demonstrated in this petition that the Fifth Circuit Court of Appeals decided a question of federal law of constitutional proportions which has not been and should be determined by this Court, U.S. Sup. Ct. Rule 17(c). It is also demonstrated that to a substantial extent the reasoning of the Fifth Circuit is in conflict with applicable decisions of this Court and

with decisions of other courts of appeals. U.S. Sup. Ct. Rule 17(a), (c).

The issue of entitlement to a jury trial in a racial discrimination case under 42 U.S.C. § 1981 narrowly was denied certiorari in 1981 under circumstances which are materially distinguishable from this case. Novak Investment Company vs. Setser, 454 U.S. 1064, 70 L.Ed.2d 601 (1981).

It is respectfully submitted that the action of the Fifth Circuit in finding waiver of a jury trial on State pendent claims is such a substantial departure from the accepted and usual course of judicial proceedings as to warrant an exercise of this Court's supervisory power. U.S. Sup. Ct. Rule 17(a).

I.

The Constitutional Right to a Jury Trial in a Racial Discrimination Case Must Not Rest Ultimately On the Wording of the Pleadings or On an Anticipation of Facts to Be Established.

A. Relationship to Pending Cases.

The employee alleged racial discrimination against him as an Indian and sued under the provisions of 42 U.S.C. § 1981.

This Court has granted certiorari on two cases which deal with what constitutes racial discrimination under that statute, Shaare Tefila Congregation vs. Cobb, 785 F.2d 523 (4th Cir. 1986), cert. granted, No. 85-2156 (Oct. 7, 1986), and Al-Khazraji vs. Saint Francis College, 784 F.2d 505 (3rd Cir. 1986) cert. granted, No. 85-2169 (Oct. 7, 1986).

The employee believes that persons from India are generally known to be of different skin pigmentation and otherwise

significantly different from White persons within the meaning of 42 U.S.C. § 1981. The decision of this Court in the two cases above, however, could conceivably affect consideration of this petition.

B. The Importance of a Jury Trial.

As shown in the statement of the case, above, several witnesses testified of outspoken hostility against the employee because of his being Indian and of the Hindu religion, and there is no doubt that if a jury were available, the employee's case would have survived a motion for directed verdict. If a jury improperly was denied, the error was prejudicial.

"The right of trial by jury in civil cases at common law is fundamental to our history and jurisprudence." Parklane Hosiery Company vs. Shore, 439 U.S.

322, 338, 58 L.Ed.2d 552 (1979) (Justice Rehnquist, dissenting). In Shore, Justice Rehnquist traced the history of the Seventh Amendment to the Constitution and discussed its current significance in jurisprudence.

The Seventh Amendment, of course, explicitly raises the common law right to trial by jury to constitutional dimensions. Gannett Company vs. DePasquale, 443 U.S. 368, 385, 61 L.Ed.2d 608 (1979).

The fact-finding function assigned to the jury in our system of justice "is an essential factor in the process for which the Federal Constitution provides." Byrd vs. Blue Ridge Rural Electric Cooperative, 356 U.S. 525, 539, 2 L.Ed.2d 953 (1958).

This Court has described the policy embodied in the Seventh Amendment as favoring jury trials and as "of historic

and continuing strength." Simler vs. Conner, 372 U.S. 221, 222, 9 L.Ed.2d 691 (1963) (per Curiam), citing numerous authorities.

It is evident that federal judicial resources increasingly are a scarce commodity. Racial discrimination cases constitute a significant portion of federal district court filings, and the availability of jury trials may burden the calendars of the district courts. As Chief Justice Rehnquist observed in Shore, supra, the guarantees of the Seventh Amendment will prove burdensome in some instances, 439 U.S. at 346. "But, as with other provisions of the Bill of Rights, the onerous nature of the protection is no license for contracting the rights secured by the [Seventh] Amendment." Id.

C. Denial of Jury Trial Below.

The record unmistakably shows that both the trial and appellate courts erroneously concluded that the case had been placed on a non-jury calendar. This alone might suffice for this Court to exercise its general supervisory power in correcting a serious prejudicial error. However, the issues are of substantially more significance.

In rejecting the challenge to the trial court's denial of jury trial on the racial discrimination claim, the Fifth Circuit considered the determinative issue whether there had been error in refusing to amend the pleadings. "Thus, notwithstanding the contentions of the parties, we view the more substantial issue with respect to Jain's 42 U.S.C. § 1981 allegations as whether the district court abused its discretion by denying Jain leave to amend his first

amended complaint." Appendix at A-14. The Fifth Circuit also noted in a footnote that even had the amendment been allowed that the employee would not necessarily have been entitled to a jury trial "by the law of this circuit." Id. at A-16.

It is clear, then, that in the Fifth Circuit's opinion the right to a jury trial in a § 1981 action depends upon the words a plaintiff chooses to use in his complaint.

D. The Standards in This Court.

The right to trial by jury is protected by the United States Constitution, while that of trial by courts is not. Accordingly, the discretion of a trial judge is narrowly limited and must, wherever possible, be exercised to preserve a jury trial. Beacon Theatres vs. Westover, 359 U.S. 500, 510, 3 L.Ed.2d

988 (1959).

A party entitled to a jury trial cannot be deprived of such a trial without his consent, and such a party does not lose his right to a jury trial because equitable and legal claims are mixed in his action. Id., citing Scott vs. Neely, 140 U.S. 106, 109, 110, 35 L.Ed. 358 (1891). See, also, Ross vs. Bernhard, 396 U.S. 531, 24 L.Ed.2d 729 (1970); Dairy Queen, Inc. vs. Wood, 369 U.S. 469, 8 L.Ed.2d 44 (1962).

The Fifth Circuit analysis rests upon the assumption that racial discrimination claims under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e et seq., are determined by the court without a jury, while an individual alleging racial discrimination under 42 U.S.C. § 1981 may be entitled to a jury.

Initially, it should be noted that the restriction of Title VII trials to the courts is based on policy principles and not upon an interpretation of the rights under the Seventh Amendment.

In Albemarle Paper Company vs. Moody, 422 U.S. 405, 415-416, 45 L.Ed.2d 280 (1975), this Court accepted by implication the ruling of the appellate court that remedies under Title VII are discretionary with the court and equitable in character. Concurring in the opinion and judgment of the majority on the basis of the Title VII language and policy principles, Chief Justice Rehnquist considered whether Title VII back pay awards were "a thinly disguised form of damages," and commented: "To the extent that [the trial court's] discretion is replaced by awards which follow as a matter of course from a finding of

wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment." 422 U.S. at 443.

It is respectfully submitted that to depart from this apparently fine distinction and rely upon an even finer distinction of how a plaintiff chooses to characterize his claims of racial discrimination is inconsistent with the Federal Rules of Civil Procedure and precedent in this Court.

In Dairy Queen vs. Wood, supra, this court considered whether the right to a jury could depend upon whether the claim was cast as an "accounting," rather than an action for "a debt" or "damages." 369 U.S. at 477. The conclusion was that "the constitutional

right to trial by jury cannot be made to depend upon the choice of words used in the pleadings. " 369 U.S. at 477-478. In Ross, supra, the court similarly emphasized that the Seventh Amendment right rests upon the nature of the issue to be tried. 396 U.S. at 538.

To the extent that the Fifth Circuit rule stands for the proposition that the right to trial by jury depends upon the wording of the pleadings, it is directly contrary to the opinions of this Court. A right of such fundamental importance cannot rest upon whether a pleading happens to claim racial discrimination against an individual because he is "Indian" as distinguished from one pleading racial discrimination because he is "African" or other similar characterization which adequately gives notice as a matter of common

knowledge.

In considering whether the action of the Fifth Circuit conforms to the standards of this Court, it is of particular importance to consider that the trial court decision in denying a jury did not rest on the question of whether or not the pleadings were sufficient to state a cause of action either under 42 U.S.C. § 1981 or under the Texas defamation law. As demonstrated in the statement of the case, the trial court specifically considered the § 1981 claim and found as fact that the employee was protected by its provisions. The trial court also made findings with respect to the defamation claim. Those findings were made on the basis of exactly the same pleading on which the trial by jury was denied.

The parties proceeded to trial of the case to include racial discrimination

under § 1981. As shown above, the company opposed further amendment of the pleadings on the grounds that the case was one of racial and religious discrimination and should not be expanded to include national origin discrimination. Under these circumstances, here, as in Curtis vs. Loether, 415 U.S. 189, 190 n. 1, 39 L.Ed.2d 260 (1974), "it is irrelevant that the pleadings were never formally amended."

E. Opinions in Other Courts of Appeal.

The Fifth Circuit framed the issue as one centering on amendment of the pleadings, which has just been shown to have been erroneous and irrelevant. The vice of the Fifth Circuit's analysis, however, rests on the premise that the right to a jury trial can be determined solely by consideration of

the complaint, in particular whether the prayer for compensatory and punitive damages rests on "unsupported allegations." Lynch vs. Pan American World Airways, Inc., 475 F.2d 764, 765 (5th Cir. 1973) (per Curiam). At least one appellate court has made what appears to be a request for guidance by this Court. "There is surprisingly little authority on when a jury trial determination need be made." Hildebrand vs. Board of Trustees of Michigan State University, 607 F.2d 705, 709 (6th Cir. 1979).

Dissenting in Setser, supra, Justice White, joined by Justice Brennan and Justice Marshall, stated that there should be no such thing as "the law of the circuit" with respect to an issue as fundamental as the right to a jury trial. 454 U.S. at 1066. Writing respecting the denial of certiorari in that case,

Justice Stevens observed that the courts both in Setser and in Moore vs. Sun Oil Company of Pennsylvania, 636 F.2d 154 (6th Cir. 1980), had held that the issue of liability under 42 U.S.C. § 1981 should be determined by a jury. The position of the Fifth Circuit, focusing on relief, not liability, is not worthy of equal consideration.

Citing cases from the Seventh, Third, and Second Circuits, which it interpreted to hold that the entitlement to a jury should be decided on allegations and relief sought in the complaint, the Sixth Circuit in Hildebrand found such analysis too restrictive. It concluded that the appropriate analysis would be whether the claims can resist a motion for summary judgment. 607 F.2d at 709-710.

The Third Circuit specifically has rejected both Hildebrand and Lynch.

"To the extent that these cases can be read to require plaintiff to aver specific facts or evidence in support of his claim for compensatory or punitive damages, we reject them as being incompatible with our precedents. As long as it appears from the pleadings that there is an issue triable of right by a jury, the plaintiff is entitled to a jury trial." Laskaris vs. Thornburgh, 733 F.2d 260, 264 (3rd Cir. 1984), cert denied, ____ U.S. ____, 83 L.Ed.2d 196 (1984).

The opinion of the Fifth Circuit below specifically states the contention that the availability of a jury trial under 42 U.S.C. § 1981 depends at present on the law of the circuit. There is an important fundamental right involved. This is precisely the type of case which requires resolution by this

Court.

II.

Failure to Continue Protest After a Written Order Denying Jury Trial Is Not a Waiver

Without discussion, the Fifth Circuit states in its opinion that the record "overwhelmingly" demonstrates that the employee's counsel knowingly abandoned his claim to a jury trial and freely acquiesced in a non-jury trial. Appendix at A-17, 18.

The company contended that the employee waived his claim by failing to object to the setting of the case on the non-jury docket. As has been demonstrated, the court's docket from the start took cognizance of the jury demand, and the case, before the order denying jury, had been scheduled for jury selection and trial.

The company also asserted an alleged

failure by the employee to request a jury trial "other than in the demand in his original and first amended complaints." Id. at A-17. Of course, that is all that Rule 38(b) requires.

Finally, the company contended that there was waiver in the employee's participation in pretrial proceedings and a trial to the court. All of this, of course, occurred after the written order denying the jury trial.

Finding a waiver under these circumstances not only is grounded upon factually erroneous premises, but it is directly contrary to longstanding precedent in this Court. As shown, the right to a jury trial is fundamental and every reasonable presumption must be indulged against its waiver. Aetna Insurance Company vs. Kennedy, 301 U.S. 389, 393, 81 L.Ed. 1177 (1937).

The circumstances in the earlier Fifth Circuit decisions which were cited as authority below are drastically different. In Jones vs. Birdsong, 679 F.2d 24 (5th Cir. 1982), reh den., 683 F.2d 417, cert denied, 459 U.S. 1202, 75 L.Ed. 2d 433 (1983), a verbal request for a jury trial was denied by a magistrate in a pretrial conference, and never brought to the attention of the judge presiding at trial. In Southland Reship vs. Flegel, 534 F.2d 639 (5th Cir. 1976), The attorney for the party seeking jury trial explicitly waived the right on the record at the commencement of trial, 534 F.2d at 644.

The question of whether a "knowing and intelligent" waiver is required need not be reached. See, e.g., Schneckloth vs. Bustamonte, 412 U.S. 218, 235-237, 36 L.Ed.2d 854 (1973).

Here, the employee demanded a jury as specifically required by the Federal Rules. After notice of jury selection and trial issued, the employee filed a motion to amend his complaint which in no way referred to his right to a jury. The court permitted ex parte opposition by telephone. Appendix at A-30.

The result is governed by Rule 46, Federal Rules of Civil Procedure: "Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and, if a party has no opportunity to

object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him."

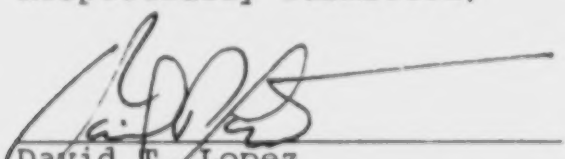
Denial of the jury on the State defamation claim was not waived, and the finding of waiver by the Fifth Circuit is such a departure from accepted judicial practice as to warrant reversal by this Court in the exercise of its supervisory authority.

CONCLUSION AND PRAYER

The Seventh Amendment right to a jury trial is a fundamental right which should not depend on the law of one circuit, and review is warranted to impose consistency in accordance with this Court's established precedent. A finding of waiver by acquiescence in a written order of a trial court is inconsistent with the Federal Rules of Civil Procedure and a substantial

departure from accepted judicial practice. This Court's supervisory authority should be exercised to correct this error. Review should be granted, and upon review, this case should be remanded for trial by a jury of those issues for which a right to a jury is secured to the employee by the Seventh Amendment.

Respectfully submitted,

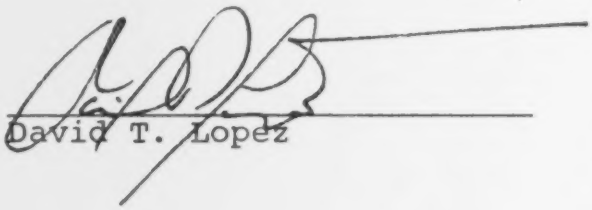


David T. Lopez
Attorney for Petitioner
David T. Lopez & Assoc.
7660 Woodway - Suite 250
Houston, Texas 77063
(713) 266-5536

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify that three copies of this petition for writ of certiorari were served this 19th day of November, 1986, by placing

them in the United States mail, first class postage prepaid, addressed to the Respondent's counsel of record, Bob Burleson, Esquire, at his post office address, P. O. Box 844, Temple, Texas 76503, in accordance with Rule 28.3 of the Rules of this Court.



David T. Lopez

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1497
Summary Calendar

D.C. Docket No. CA-W-83-CA-29

KEWAL JAIN,

Plaintiff-Appellant,

versus

ITT GRINNELL CORPORATION,

Defendant-Appellee.

Appeal from

the United States District Court

for the Western District of Texas

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 4, 1986

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1497

KEWAL JAIN,

Plaintiff-Appellant,

versus

ITT GRINNELL CORPORATION,

Defendant-Appellee.

Appeal from

the United States District Court

for the Western District of Texas

ON PETITION FOR REHEARING

(August 25, 1986)

Before POLITZ, GARWOOD, and JOLLY, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for

rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

(E. Grady Jolly)
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 85-1497
Summary Calendar

KEWAL JAIN,

Plaintiff-Appellant,

versus

ITT GRINNELL CORPORATION,

Defendant-Appellee.

Appeal from

the United States District Court

for the Western District of Texas

(August 4, 1986)

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

PER CURIAM:*

This case presents three questions for our review. The first is whether the district court abused its discretion by

denying a Title VII plaintiff leave to amend his complaint to add factual allegations in support of a cause of action under 42 U.S.C. § 1981. The second is whether the district court erred by denying the plaintiff a jury trial on his non-Title VII claims. The third is whether the district court's findings of facts are clearly erroneous. We answer all three questions in the negative, and therefore affirm.

I

Kewal Jain ("Jain"), the plaintiff-appellant, is a native of India who came to the United States in 1974. He was

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

hired as a shipping manager by the defendant-appellee, ITT Grinnell Corporation ("ITT"), in 1978. In 1980 Jain was promoted to manager of industrial engineering at ITT's plant in Temple, Texas, and shortly thereafter was promoted to tooling manager.

As tooling manager, Jain supervised Robert Schultz ("Schultz"), the supervisor of the tool and die department. Schultz and Jain did not have a good working relationship from the beginning of the time they started working together. In August 1980, Harold Nichols ("Nichols") was hired as ITT's operations manager for the Temple plant and became Jain's supervisor. Shortly after assuming the position of operations manager, Nichols became aware of the tensions between Jain and Schultz.

In June 1981, Nichols informed Jain

that Jain was being transferred laterally to become manager of industrial engineering. The new job involved no change in salary, and required supervision of substantially the same number of employees that Jain supervised as tooling manager.[1] Jain refused to accept this transfer, and tendered his resignation to Nichols. Nichols, however, did not accept Jain's resignation. He arranged for the personnel manager to meet with himself and Jain. After several days of discussions among these three and the vice president of ITT,

---

[1]Nichols testified at trial that the transfer was necessary because Nichols suspected that employees were pilfering materials "out the back door"; supervision was thus needed in this area, encompassing three departments. Nichols also testified that he took the opportunity of the transfer to address some of the communications problems that Jain was having, specifically, his "refusal to listen," and his tendency to "demand" instead of ask for something.

Dale Waterhouse, Jain agreed to accept the new job with a different title, manager of management systems, and no change in salary.

Aside from some minor incidents between Jain and some of the men in his department, Jain worked well in his new position until November 1981. In late October 1981, Nichols was informed by Waterhouse that he was to be appointed plant manager for the entire Temple plant. Nichols then took a short vacation. While Nichols was on vacation and again when he returned to the plant in November, several employees informed him that Jain had urged them to complain to Waterhouse about Nichols. Nichols confronted Jain about his alleged behavior, and, after a short discussion, suspended him from the job. Nichols asked Jain to return to the plant the following morning to meet with

him and with the vice president, which Jain did. Jain was notified at that meeting that he could either resign or be terminated for cause. He chose to resign.

After an extended but unsuccessful job search, Jain filed a charge against ITT Grinnell with the Equal Employment Opportunity Commission ("EEOC"), charging discrimination based on national origin and religion. He received a "Notice of Right to Sue" letter from the EEOC, and filed a timely complaint in district court in February 1983.

Although he invoked the court's jurisdiction under both 42 U.S.C. §§ 2000e et seq. ("Title VII") and 42 U.S.C. § 1981, he alleged that he had been forced to resign only because of his national origin, India, and/or because of his religion, Hindu, thus alleging exclusively Title VII violations.[2] Jain also invoked the

district court's pendent jurisdiction for a state slander cause of action, claiming that ITT employees had made defamatory statements about him to prospective employers after his resignation in November 1981. He requested a declaratory judgment, reinstatement, back pay, and compensatory damages for "anguish and humiliation."

Jain moved on January 11, 1984, for leave to amend his first amended complaint[3] by adding an allegation of discrimination on the basis of color. Trial had already been set on the nonjury

---

[2]Jain's claims of discrimination based on national origin and religion are covered by Title VII, 42 U.S.C. § 2000e-2(a), and are not addressed by 42 U.S.C. § 1981, which applies only to race or color.

[3]Jain amended his original complaint in August 1983 to include factual allegations in support of his state slander claim.

docket for January 1984. Leave to amend was denied by the district court on January 12, 1984, on the grounds of untimeliness. The district court stated that Jain sought amendment "in order to be entitled to a jury trial under 42 U.S.C. § 1981." The case was reset on the nonjury docket with a March 1984 trial date. Jain was granted extensions of time to secure new counsel after his attorney withdrew from the case, and the case went to trial without a jury in July 1985. From January until the time of trial, no further attempt was made to amend the complaint to allege discrimination on the basis of race or color, nor was any objection raised that the trial was on the nonjury calendar.

The district court found that Jain had failed to prove his Title VII claims, and that he had failed to prove his pendent state claim of slander. Judgment

was entered for the defendant. Jain appeals.

II

Jain's first argument is that he was wrongfully denied a jury trial. He recognizes that there is no right to a jury trial under Title VII. See Lehman v. Nakshian, 453 U.S. 156, 164, 101 S.Ct. 2698, 2703, 69 L.Ed.2d 548 (1981). He argues, however, that because he made a demand for compensatory damages under section 1981 and under state law, and because the district court considered that demand, he is entitled to a jury trial on his non-Title VII issues. The defendant responds by arguing that Jain waived his right to claim a jury trial when he failed to timely object to the district court's denial of his request for one.

We begin our discussion by noting that the complaint upon which this case was

tried does not state a section 1981 cause of action, as it fails to allege race or color as the basis of the discrimination. Furthermore, no objection was ever made that the case had been placed on the non-jury calendar. Thus, notwithstanding the contentions of the parties, we view the more substantial issue with respect to Jain's 42 U.S.C. § 1981 allegations as whether the district court abused its discretion by denying Jain leave to amend his first amended complaint. Federal Rule of Civil Procedure 15(a) provides that a party may amend his pleading after a responsive pleading is served "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The most frequent reason for denying leave to amend is that the opposing party will be prejudiced if the movant is allowed to

alter his pleading. In this case, although Jain had invoked the court's jurisdiction under 42 U.S.C. § 1981 in his original complaint and in his first amended complaint, in neither of those pleadings did he make any factual allegations that would support a section 1981 claim. The case had been placed on the nonjury calendar without objection. Jain then moved to amend his first amended complaint one week before the scheduled nonjury trial was due to begin. The defendants objected to the motion on the basis of time constraints. Under these circumstances, we hold that the district court did not abuse its discretion in denying Jain's motion as untimely.[4] After the case had been reset for trial, Jain made no further effort to amend his complaint to allege discrimination on the basis of race or color, and the case properly went to trial on

Jain's first amended complaint.

III

We now turn to whether the district court improperly denied Jain a jury trial on his pendent state claim of slander. Although Jain's brief does not set out this issue with a great deal of clarity,

---

[4]We note that even had the district court granted Jain leave to amend so as to include allegations to support a section 1981 claim, he would not necessarily have been entitled to a jury trial on the issue. Jain's argument is foreclosed by the law of this circuit. His primary claim is an equitable one under Title VII for reinstatement and back pay, carrying with it no right to a jury trial. Section 1981 is a parallel remedy against discrimination. Its legal principles are often derived from Title VII, as is the situation here. See Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979). In Lynch v. Pan American World Airways, 475 F.2d 764 (5th Cir. 1973), this court held that a plaintiff may not unilaterally change the nature of what is essentially a Title VII proceeding "by framing his prayer under § 1981 or by making unsupported allegations for compensatory and punitive damages." Id. at 765. See also Earlie v. Jacobs, 745 F.2d 342, 344 (5th Cir. 1984); Blum, 597 F.2d at 938.

he does argue that the seventh amendment guarantees him the right to a jury trial in suits at common law, and he points out that the district court considered his slander claim for compensatory damages. The defendant responds by arguing, as indicated above, that any right that Jain may have had to claim a jury trial was waived by his failure to object to the setting of the case on the nonjury docket; his consent to a proposed nonjury pretrial order; his failure, other than in the demand in his original and first amended complaints, to request from the district court a jury trial on this issue; and his submission to the court of a set of findings of fact and conclusions of law, some of which relate to the slander claim.

We agree with the appellee that the record overwhelmingly demonstrates that Jain's counsel knowingly abandoned his

earlier claim to a jury trial and that he freely acquiesced in a nonjury trial. Under these circumstances, we hold that Jain cannot now complain that he was denied a jury trial, because he waived his right to one. See Southland Reship, Inc. v. Flegel, 534 F.2d 639, 644 (5th Cir. 1976). See also Jones v. Birdsong, 679 F.2d 24, 25-26 (5th Cir. 1982).

IV

Jain's third argument is that the district court's findings of no discrimination and no slander are clearly erroneous. We are bound in our review to accept the district court's view of the evidence if that view is plausible in the light of the record as a whole. Anderson v. City of Bessemer City, ___ U.S. ___, 105 S.Ct. 1504, 1512 (1985).

Having reviewed the briefs, the documents, and the trial transcript of this

case, we hold that the district court's findings of fact are amply supported by the record. There is no evidence to support Jain's claim of discrimination on the basis of his religion and it seems to us that the district court's finding that Jain had failed to make out a prima facie case on that claim is accurate. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Because, however, this case was fully tried on the merits, we address only the "ultimate question" of whether Jain's rejection was the result of his employer's discriminatory intent within the meaning of Title VII. United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983). As far as Jain's claims that he was discriminated against because of his national origin and his religion are

concerned, we hold that even if Jain did make out a prima facie case on these claims, ITT has articulated a legitimate, nondiscriminatory business reason for its actions with respect to Jain. Jain has not shown that reason to be a pretext for discriminatory intent, and he has not shown that any other ITT employee behaved similarly to the way he behaved without being asked to resign. The district court credited the employer's explanation of its motivation, and we see no reason to disturb the court's findings or conclusions.

We also note that although Jain did not expressly state a Title VII claim based on race, the district court found that he proved on that issue a prima facie case, which the defendant successfully rebutted. We affirm the district court's holding that Jain has failed to prove by

a preponderance of the evidence that ITT's articulated reason for requesting Jain's resignation was a pretext for illegal discriminatory intent, whether based on consideration of race, national origin, religion, or any other classification protected by Title VII.

Finally, Jain does not argue on appeal that the district court's findings on his pendent state slander claim are clearly erroneous. We have reviewed the record and are convinced that the district court did not err by concluding that Jain failed to prove by a preponderance of the evidence his pendent state claim of slander.

For these reasons, the judgment of the district court that Jain take nothing is

A F F I R M E D.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

KEWAL JAIN, Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION NO.
	§	W-83-CA-29
ITT GRINNELL CORPORATION, Defendant.	§	

FINDINGS OF FACTS
AND
CONCLUSIONS OF LAW

On the 1st and 2nd days of July, 1985, the above cause came to be considered by the Court. Having considered the pleadings, evidence and arguments of counsel, the Court now makes the following Findings:

FINDINGS OF FACT

1) Plaintiff was, from 1978 until his forced resignation in 1981, an employee of Defendant.

Defendant, at all relevant times had more than 15 employees.

2) Plaintiff is a citizen of East India, and as such, is a member of a protected class for purposes of 42 U.S.C. 1981 and 42 U.S.C. 2000e(5).

3) Plaintiff presented no credible evidence that Defendants' employees or agents in any way defamed or harmed him in discussions with prospective employers after his termination.

4) Plaintiff failed to prove by a preponderance of the evidence that he was treated differently than white employees of Defendant.

5) Regarding his Title VII claim that he was discriminated against because of his religion, Plaintiff

failed to prove a McDonnell-Douglas prima facie case, because he failed to prove that any employee of Defendant who was involved in Plaintiff's termination was even aware that he was a practicing Hindu.

6) Regarding Plaintiff's Title VII claim that he was discriminated against (terminated) because of his race, Plaintiff did prove a McDonnell-Douglas prima facie case. However, Defendant articulated a reasonable non-discriminatory reason for Plaintiff's termination. That reason was the belief of Mr. Nichols and Mr. Waterhouse, whether true or not, that Plaintiff had urged hourly

employees to approach Mr. Waterhouse regarding complaints against Mr. Nichols. This action and other actions by Plaintiff proved him to be, in the eyes of management, a disruptive force in Defendant's plant. Plaintiff failed to prove by a preponderance of the evidence that Defendant's articulated reason for Plaintiff's forced resignation was pretextual.

7) Plaintiff failed to prove by a preponderance of the evidence that his forced resignation was motivated by discriminatory reasons.

CONCLUSIONS OF LAW

1) This Court has jurisdiction of the parties and the subject matter. 42 U.S.C. 1981 and 42 U.S.C.

2000e, et seq. (Title VII of the Civil Rights Act of 1964).

2) The Plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. McDonnell-Douglas Corporation v. Green 411 U.S. 792 (1973).

3) In Title VII disparate action cases, Plaintiff must show a discriminatory motive Irby v. Sullivan, 737 F.2d 1418 (5th Cir. 1984).

4) Plaintiff had the burden of proving his pendent state law claim for slander by a preponderance of the evidence.

5) Defendant is entitled to a judgment that Plaintiff take nothing.

Any Finding of Fact which should

more properly be a Conclusion of Law is deemed to be so. Any Conclusion of Law which should more properly be a Finding of Fact is deemed to be so.

SIGNED and ENTERED this 3rd day of July, 1985.

(Walter S. Smith, Jr.)
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

KEWAL JAIN, Plaintiff,	§ §	
v.	§ § §	CIVIL ACTION NO. W-33-CA-29
ITT GRINNELL CORPORATION, Defendant.	§ § §	

J U D G M E N T

In accordance with the Findings of Fact and Conclusions of Law heretofore entered in this cause, the Court enters its Judgment as follows:

IT IS ORDERED, ADJUDGED and DECREED that Plaintiff KEWAL JAIN take nothing in his suit against Defendant ITT GRINNELL CORPORATION.

IT IS FURTHER, ORDERED, ADJUDGED, and DECREED that costs of Court are hereby

assessed against each party incurring same, for which execution may issue if not timely paid.

SIGNED and ENTERED this 3rd day of July, 1985.

(Walter S. Smith, Jr.)
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

KEWAL JAIN	)	
VS.	)	
ITT GRINNELL CORPORATION	)	NO. W-83-CA-29
	)	

ORDER

Came on this day for consideration Plaintiff's motion for Leave to Amend Plaintiff's First Amended Complaint. Amendment is sought to allege that Plaintiff was discriminated against on the basis of color (Plaintiff is from India), in order to be entitled to a jury trial under 42 U.S.C. §1981. This case has been set for trial during the week of January 16, 1984, and due to time constraints, counsel for Defendant has objected telephonically to Plaintiff's Motion.

The Court is of the opinion that Plaintiff's Motion for Leave to Amend is untimely, and that this case should remain on the non-jury docket. Accordingly,

IT IS ORDERED that Plaintiff's Motion for Leave to Amend Plaintiff's First Amended Complaint be and is hereby DENIED.

SIGNED and ENTERED this 12th day of January, 1984.

(Lucius D. Bunton)
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

KEWAL JAIN, Plaintiff,	§ § §	
vs.	§	CIVIL ACTION NO.
	§	W-83-CA-29
ITT GRINNELL CORPORATION, Defendant	§ § §	

PLAINTIFF'S MOTION FOR LEAVE TO AMEND PLAINTIFF'S FIRST AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Plaintiff, by and through his attorney, and moves this Court for leave to amend Plaintiff's First Amended Complaint and in support would allege as follows:

1. Plaintiff has filed the within complaint against the Defendant complaining, in part, that Defendant violated his rights to be free from discrimination as guaranteed by 42 U.S.C. §1981.

2. In alleging a violation of 42

U.S.C. §1981 Plaintiff stated that he was East Indian but neglected to allege that he was non-caucasian or non-white.

3. Plaintiff seeks leave to amend his First Amended Complaint to allege that the purported discriminatory conduct committed by the Defendant was perpetrated, at least in part, because of Plaintiff's color.

4. This amendment will not prejudice the Defendant in that no additional causes of action are being pursued nor is additional relief requested. Plaintiff is merely alleging an obvious fact, Plaintiff's color, which he had neglected to include in his prior pleadings.

WHEREFORE, Plaintiff prays that he be permitted to amend Plaintiff's First Amended Complaint to include an allegation under 42 U.S.C. §1981 regarding his color.

Respectfully submitted,

GREENSTEIN & KOLKER
1402 East First Street
Austin, Texas, 78702
(512) 472-6270

(Malcolm Greenstein)
MALCOLM GREENSTEIN

ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Plaintiff's Motion For Leave To Amend Plaintiff's First Amended Complaint has been mailed to Bob Burleson, P.O. Box 844, Temple, Texas, 76503, by certified mail, return receipt requested, on this 11th day of January, 1984.

(Malcolm Greenstein)
MALCOLM GREENSTEIN

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

WACO DIVISION

CHARLES W. VAGNER
Clerk of Court

P.O. Box 608
Waco, TX 76703-0608

KEWAL JAIN	X	
	X	
vs.	X	CIVIL ACTION NO.
	X	W-83-CA-29
ITT GRINNELL	X	
CORPORATION	X	

TAKE NOTICE that the above entitled case has been set for:

__x__ TRIAL SETTING (date and/or time to be set at docket call)

__x__ DOCKET CALL

__x__ JURY SELECTION

_____ REPORT ON STATUS

_____ MOTIONS HEARING

_____ OTHER _____

at 9:30 A.M., on Monday, January 16, 1984, at U.S. Post Office and Courthouse, 800 Franklin Avenue, Room 301, Waco,

Texas.

DATE: December 28, 1983

CHARLES W. VAGNER, Clerk

by (Joy Flowers)
Joy Flowers,
Deputy Clerk

TO: Judge Lucius D. Bunton
Courtroom Deputy - Pieper
Court Reporter - Smith
Clerk

Mr. Malcolm Greenstein

Mr. Bob Burleson

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-827

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

KEWAL JAIN,

Petitioner,

vs.

ITT GRINNELL CORPORATION,

Respondent.

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bob Burleson
BOWMER, COURTNEY, BURLESON,
NORMAND & MOORE, P.C.
P. O. Box 844
Temple, Texas 76503
(817) 778-1354

Attorney for Respondent

NO. 86-827

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

KEWAL JAIN,

Petitioner,

vs.

ITT GRINNELL CORPORATION,

Respondent.

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Bob Burleson
BOWMER, COURTNEY, BURLESON,
NORMAND & MOORE, P.C.
P. O. Box 844
Temple, Texas 76503
(817) 778-1354

Attorney for Respondent

QUESTIONS PRESENTED

1. Did the Petitioner, by acting in such a way as to demonstrate clear acquiescence to the trial of this case before the court and abandonment of his demand for a jury trial, waive any right that he might have had to a jury trial?

2. May the Petitioner, having failed to object in any manner to the trial of this case before the court, raise the issue of the right to a jury trial for the first time on appeal?

LIST OF CORPORATE AFFILIATES OF ITT GRINNELL CORPORATION

ITT GRINNELL CORPORATION (Respondent) has changed its name since the filing of this suit. Its new corporate name is ITT FLUID TECHNOLOGY CORPORATION.

Parent corporation: ITT HOLDINGS, INC.

Parent of parent: ITT CORPORATION

Subsidiaries of Respondent:

GRINNELL GMBH (German corp.)

Affiliates of Respondent (subsidiaries of Respondent's parent:

1. INTERNATIONAL STANDARD ELECTRIC CORPORATION
2. ITT LTD. (U.K. corp.)
3. ITT CANADA LTD. (Canadian corp.)
4. ITT INDUSTRIES, INC.
5. FLYGT CORPORATION

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
LIST OF CORPORATE AFFILIATES OF ITT GRINNELL CORPORATION.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF THE ARGUMENT.....	9
ARGUMENT.....	11
I. Assuming that the Petitioner had a right to a Jury Trial in this case, he waived that right by acquiescing to a Trial before the Court.....	11
II. The Petitioner may not complain about the lack of a Jury Trial for the first time on Appeal.....	19
CONCLUSION AND PRAYER.....	21
CERTIFICATE OF SERVICE.....	22

TABLE OF AUTHORITIES

Page

Statutes:

42 U.S.C. 1981..... 9,13,21

42 U.S.C. 1983..... 15

42 U.S.C. 2000e et seq..... 12,18,21

Cases:

Adams v. U.S., 318 F.2d 861 (9th Cir. 1963)..... 19

Allen v. Barnes Hospital, 721 F.2d 643 (8th Cir. 1983)..... 11,12,13

Amburgey v. Cassady, 507 F.2d 728 (6th Cir. 1974)..... 12,15

Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949), cert. denied, 388 U.S. 816, 70 S.Ct. 57, 94 L. Ed. 494 (1949)..... 12

Bradley v. Maryland Casualty Company, 382 F.2d 415 (8th Cir. 1967)..... 12,16

Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974).... 12

Kearney v. Case, 79 U.S. (12 Wall) 275, 284, 20 L.Ed. 395 (1871)..... 12

Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973)..... 18

National Family Ins. Co. v. Exchange Nat. Bank of Chicago, 474 F.2d 237 (7th Cir. 1973)..... 12,19

Quaker City Gear Works, Inc. v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 2676, 86 L.Ed. 2d 694..... 11

Southland Reship, Inc. v. Flegel, 534 F.2d 639 (5th Cir. 1976)..... 11,14,15

Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed. 2d 701 (1976)..... 19

Rules:

Federal Rule of Civil Procedure 39, 39a..... 18

STATEMENT OF THE CASE

The Statement Of The Case presented by Petitioner in his Petition omits numerous critical facts. Therefore, it is necessary for Respondent to supplement the Petitioner's Statement with the following facts.

This case involves a complaint by the Petitioner that he was terminated from his job by the Respondent because of his national origin and/or his religion. The case was set for jury trial on January 16, 1984, as reflected in the district court's Notice of Trial Setting, issued on December 28, 1983. The case was subsequently placed on the non-jury docket, as is reflected by the district court's Order of January 12, 1984.

The record is silent as to how this case was transferred from the jury docket

to the non-jury docket. On January 16, 1984, the day of trial, the following "MEMO OF PROCEEDINGS" is found on the Docket Sheet: "Attorneys announced ready. ETT: 2 days. Non-jury trial to be held sometime this week." Petitioner has failed to bring forward any record of the statements of counsel on January 16, 1984, but the Docket Sheet clearly shows that Petitioner's trial attorney announced ready for a non-jury trial at that time. (It should be noted that the attorney for the Petitioner on January 16, 1984, the attorney for Petitioner at the time of trial on July 1, 1985, and the attorney who represents Petitioner at present, are all different attorneys from different firms.)

The record is silent as to why the case was not tried the week of January

16, 1984, but the record clearly shows that at least four subsequent Notices of Trial Settings were sent to the parties notifying them that the case was set for NON-JURY trial. These were sent out on January 31, 1984, for trial on March 5, 1984; on March 4, 1985, for trial on March 25, 1985; on April 9, 1985, for trial on May 2, 1985; on May 2, 1985, for trial on July 1, 1985. A fifth Notice, sent March 12, 1984 for trial on March 26, 1984, was also apparently for non-jury trial, since no jury selection was provided for. There is no record of any objection having been made to these non-jury settings by the Petitioner.

Furthermore, on September 12, 1984, the Petitioner filed a Motion For Leave To Amend Complaint. The Petitioner also filed a copy of his proposed Third Amended Complaint, which was returned to

was returned to him after the Court denied his motion on October 1, 1984. (Docket Sheet entry of 10-4-84). That proposed Amended Complaint contains no demand for a jury.

The record also shows that the Petitioner not only never raised the issue of a jury trial again, and not only announced ready for a non-jury trial, but further shows that he, without qualification, prepared and filed a Proposed Pre-Trial Order for a non-jury trial and also prepared and filed Proposed Findings of Fact and Conclusions of Law for a non-jury trial.

On July 1, 1985, the Petitioner's attorney, without qualification or any reference to the prior demand for a jury, announced ready for trial before the Court on a non-jury basis. (Trial Transcript, page 2) The case then

proceeded to trial before the Court without any objection having ever been raised concerning the lack of a jury trial.

The complete absence in the record of any objections to a trial before the Court, the announcements of "ready" by the Petitioner's counsel on the non-jury docket, the multiple notices of non-jury trial sent to the Petitioner's attorney and received without objection, the preparation of a non-jury pre-trial order by the Petitioner's attorney, and the submission to the Court of a proposed findings of fact and conclusions of law by the Petitioner's attorney for a non-jury trial, all point to one inescapable conclusion: that the Petitioner voluntarily waived any right that he might have had to a jury trial in this case. Respondent's position is that the Petitioner had no right to a jury

trial in any event, but should that issue be decided against Respondent, there can be no doubt that the Petitioner's rights were waived and that he failed to preserve any error in the denial of a jury trial, if any error occurred.

The Fifth Circuit Court of Appeals was of the opinion that the main issue in the appeal was whether the District Court erred in denying Petitioner's motion for leave to file an amended complaint on January 12, 1984, four days before the first trial setting. The Court of Appeals held that there was no error because of the time constraints involved. Respondent would call the Court's attention to the fact that after the January 16, 1984 trial setting was passed, the Petitioner did not make any further demand for a trial by jury, although he had ample time to do so. (The trial did not occur until almost 18

months later.) He did, however, attempt to amend his complaint again to add a wage and hour claim, which motion was denied. (Plaintiff's Third Amended Complaint) As Respondent has previously shown, that proposed amended complaint did not include a jury demand. His motion for leave to amend was denied because it attempted to allege a new claim (wage and hour claim) after discovery had been completed. (Order of 10-1-84) It is clear that the Petitioner's attempt to amend was not an effort to get a jury trial on the issue of racial discrimination, but to add the new wage and hour claim.

Therefore, whether this case is viewed in terms of the denial of the right to a jury trial, or as an abuse of discretion for denying the Petitioner leave to amend his complaint, it is clear that the Petitioner waived any rights he might have had to a jury trial by his

conduct, and failed to preserve any error that there might have been.

SUMMARY OF ARGUMENT

A. The Petitioner has cast his petition in terms of the entitlement to a jury trial in a racial discrimination case under 42 U.S.C. 1981. The true issue in this case, however, is whether the Petitioner waived any rights that he might have had to a jury by virtue of his complaint and his demand for a jury trial. The record clearly shows that Petitioner acquiesced to a trial before the court, thus waiving any right he had to a jury trial.

B. Contrary to the Petitioner's contentions, the decision of the Fifth Circuit on this issue is not in conflict with the decisions of this Court and the decisions of other courts of appeals. The finding of a waiver by the Fifth Circuit is not a substantial departure from the accepted and usual course of judicial proceedings in applicable cases.

C. A second issue is whether Petitioner properly preserved any error that may have occurred by trying this case to the court. By failing to object to a trial to the court, Petitioner failed to preserve any error that may have occurred. Furthermore, having failed to raise the issue before the trial court, he may not raise that issue for the first time on appeal.

ARGUMENT

I.

Assuming That The Petitioner Had A Right To A Jury Trial In This Case, He Waived That Right By Acquiescing To A Trial Before The Court

The right to a jury trial may be waived. See, Quaker City Gear Works, Inc., v. Skil Corp., 747 F.2d 1446, 1453 (Fed. Cir. 1984), cert. denied, 105 S.Ct. 2676, 86 L.Ed.2d 694. (Right to have jury determine any factual issue waived by agreeing that jury not answer all questions on special verdict, and that court should answer remaining questions). Even when a jury trial has been demanded, failure to object to the submission of a case to the judge instead of a jury waives the right to to a jury trial. Allen v. Barnes Hospital, 721 F.2d 643 (8th Cir. 1983); Southland Reship, Inc.

v. Flegel, 534 F.2d 639 (5th Cir. 1976); Amburgey v. Cassady, 507 F.2d 728 (6th Cir. 1974); Chapman v. Kleindienst, 507 F.2d 1246 (7th Cir. 1974); See, Kearney v. Case, 79 U.S. (12 Wall) 275, 284, 20 L.Ed. 395 (1871). When, by his conduct, a party acquiesces to a trial before the court, his conduct constitutes a waiver of any rights to a jury that he may have. National Family Ins. Co. v. Exchange Nat. Bank of Chicago, 474 F.2d 237 (7th Cir. 1973); Bradley v. Maryland Casualy Company, 382 F.2d 415 (8th Cir. 1967) (written by then-Circuit Judge Blackmun); Bass v. Hoagland, 172 F.2d 205 (5th Cir. 1949), cert. denied, 388 U.S. 816, 70 S.Ct. 57, 94 L.Ed. 494 (1949).

In Allen v. Barnes Hospital, supra, the Eighth Circuit was presented with a case that was very similar to the instant case. The plaintiff in that case had filed a Title VII claim (42 U.S.C. §

2000e et seq) and a Section 1981 claim. (42 U.S.C. § 1981). For some unknown reason, the case was placed on the court's non-jury docket eighteen months before trial. Neither the plaintiff nor her attorney objected, either before or during the trial, when the absence of a jury was obvious. The court applied the general rule that failure to object to the submission of the case to a judge instead of a jury waives the right to a jury. Allen is on all-fours with the instant case, and should be controlling. The Petitioner had the same eighteen month period to object to a trial before the court, and failed to do so. His attorney announced ready for non-jury trial, prepared proposed findings of fact and conclusions of law, prepared a pre-trial order for a non-jury trial, and acquiesced in every way to the trial before the court. Clearly, he waived any right that he might have had to a jury

trial.

In Southland Reship, Inc. v. Flegal, supra, a case involving the Sherman Act and certain state law claims, the plaintiff had demanded a trial by jury. The trial court consolidated hearings on preliminary and permanent injunctions, although the proper procedure would have been to try the legal claims before hearing the permanent injunction issue. However, counsel for the plaintiff clearly acquiesced in the procedure employed by the trial court, which resulted in a waiver of his right to have a jury determine the issue of liability. The court found that the plaintiff's counsel understood that the issue of liability was being submitted to the court in the injunction hearing, and that he participated nonetheless, even to the extent of submitting proposed findings

of fact and conclusions of law without objection. This, the court held, constituted a waiver.

Likewise, in the present case, the Petitioner's attorney participated in the trial before the court without objection, and submitted proposed findings and conclusions. As in Southland, this should constitute a waiver of the right to a jury.

In Amburgey v. Cassady, supra, the plaintiff had filed suit under 42 U.S.C. 1983, and had requested a jury trial. However, at a hearing prior to trial, when the court suggested that a jury trial might cause delay, the plaintiff's attorney stated, in effect, that he was not especially anxious to try the case before a jury, and that he knew a non-jury trial would be quicker. His statements, coupled with the fact that he commenced trial before the court without

objection, constitued waiver of his earlier demand for a jury. Similarly, in the present case, Petitioner's counsel announced ready for non-jury trial and went to trial without objection.

In Bradley v. Maryland Casualty Company, supra, the court again held that the conduct of counsel constituted a waiver of the right to a jury trial. In that case, then Circuit-Judge Blackmun found, among other things, that the following facts demonstrated a waiver of a jury trial: the long acceptance by the parties that the case was one for the court; representations of waiver by counsel at pre-trial; and proceeding to trial without further motion or objection. All of these factors are present in this case.

In summary, there is ample authority from several circuits that supports the Respondent's contention that the

Petitioner waived any right he may have had to a jury trial. Even though a jury was originally demanded, the Petitioner clearly acquiesced to the case being tried before the court, in that no objection to the notices of non-jury trial setting was ever made; the last proposed amended pleading did not contain a jury demand; the Petitioner's counsel announced ready for trial before the court on two occasions (January 16, 1984, and July 1, 1985); his counsel prepared a pre-trial order for a non-jury trial; his counsel prepared proposed findings of fact and conclusions of law for the court; and the Petitioner and his counsel proceeded to trial before the court on July 1, 1985, without any objection or motion related to a trial by jury. Under these circumstances, it is clear that a waiver occurred. No conflict exists among the circuit courts of appeal on

this issue as is apparent from the above cited cases. Those cases show that the accepted and normal course of judicial proceedings in such cases is to allow the parties to proceed to trial before the court where they clearly desire to do so, and to consider prior jury demands waived.[1]

[1]Respondent is aware of the requirements of Fed. Rule of Civil Procedure 39a, concerning trial by the court when a jury demand has been made. Respondent's position is that a) the conduct of Petitioner in acquiescing to a trial before the court satisfies the demand of an oral stipulation made in open court, and b) there was no right of trial by jury in the first place, because the suit, a Title VII employment case, was equitable in nature. See, Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973). In any event, neither party has raised the issue of Rule 39 previously, and the above cases clearly show that jury demand can be waived by a party's conduct without an actual oral stipulation under that Rule.

II.

The Petitioner May Not Complain About The Lack Of A Jury Trial For The First Time On Appeal

Since no objection to the non-jury trial was made by the Petitioner at the trial court level, this complaint was raised for the first time on the Petitioner's appeal to the Fifth Circuit. Having failed to raise the issue before the trial court, the Petitioner may not raise it for the first time on appeal. Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976); National Family Ins. Co. v. Exchange Nat. Bank of Chicago, supra at 241. Furthermore, having failed to properly preserve the alleged error by objection, the Petitioner has waived any error that might have occurred. See, Adams v. U.S., 318 F.2d 861 (9th Cir. 1963). Therefore, Petitioner should not be allowed to raise

the issue of right to trial by jury in the instant case, having failed to properly raise that issue in the trial court and having failed to properly preserve any alleged error.

CONCLUSION AND PRAYER

In summary, this is not a proper case for this Court to use to resolve the conflict between the circuits as to the right to a jury trial in cases involving Title VII and Section 1981 claims. Even assuming that the Petitioner was entitled to a jury trial in this case, the facts clearly show that he waived any such right. There is no conflict among the circuits on this point, and this Court itself has acknowledged that the right to a jury may be waived. In this case, the Petitioner, having made an initial demand for a jury, thereafter acted in such a way as to make it clear that he had abandoned that demand, and acquiesced to the trial of this case before the court. In view of these facts, the petition for writ of certiorari should be denied.

Respectfully submitted,

BOWMER, COURTNEY, BURLESON,
NORMAND & MOORE, P.C.
P. O. Box 844
Temple, Texas 76503
(817) 778-1354

Attorneys for Respondent

Bob Burleson

BOB BURLESON
State Bar No. 03425000

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, hereby certify that three copies of this response to Petitioner's Writ of Certiorari were served by certified mail, return receipt requested on attorney of record for Petitioner, Mr. David Lopez, 7660 Woodway, Suite 250, Houston, Texas 77063, this 24 day of December, 1986.

Bob Burleson

BOB BURLESON